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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DARREN PEDERSON,

Plaintiff and Appellant,

v.

APPLE, INC.,

Defendant and Respondent.

H046112
(Santa Clara County
Super. Ct. No. 1-12-CV-235530)

I. INTRODUCTION

Plaintiff Darren Pederson purchased an Apple TV 2.0 and an Apple TV 3.0 in order to wirelessly stream videos in HD [high definition] format to his HD television for immediate viewing in HD format. Pederson was dissatisfied with the performance of the Apple TV 2.0 and the Apple TV 3.0, and brought the instant action against defendant Apple, Inc. (Apple) alleging that he would not have purchased the Apple TVs but for Apple's false and misleading advertising touting HD quality and the ability to immediately view the streamed HD videos with any broadband Internet connection.

During the course of the litigation Pederson filed a motion for an order certifying the claims asserted in his complaint for violation of the unfair competition law (fraudulent misrepresentation) (Bus. & Prof. Code, § 17200 et seq.)(UCL),[1] violation of the UCL (fraudulent omissions) § 17200; and violation of the Consumer Legal Remedies

[1] All further statutory references are to the Business & Professions Code unless otherwise indicated.

Act (Civ. Code, § 1770 [false advertising]) (CLRA) on behalf of two putative classes of similarly situated persons. He also asserted that he and his counsel could adequately represent the interests of the two putative classes. The trial court denied Pederson's motion for class certification, finding that he had failed to show that common questions of fact predominated with respect to liability and damages, and also finding that Pederson's claims were not typical of the putative classes.

On appeal, Pederson contends that the trial court erred in denying his motion for class certification because the trial court improperly determined the merits of the class claims in finding that common questions did not predominate as to Apple's liability for its allegedly false and misleading advertising for the Apple TV 2.0 and Apple TV 3.0. Pederson also contends that the trial court erred in rejecting his proposed measure of class-wide damages, a full refund, and the evidence showed that his claims are typical of the putative classes.

For the reasons stated below, we conclude that the trial court did not abuse its discretion in denying Pederson's motion for class certification, and we will affirm the order.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint*

The operative pleading in this putative class action is the second amended complaint (complaint). Two of defendant Apple's products, the Apple TV 2.0 and the Apple TV 3.0, are the subject of the class claims. Both generations of the Apple TV are devices designed to play digital content from Apple's iTunes store and other sources on a television.

According to the complaint, Apple advertised, in press releases and on its packaging, that the Apple TV 2.0 enabled consumers to watch purchased or rented digital high definition [HD] movies and television shows on their HD television sets. Pederson alleges that Apple's advertising was false, misleading, and had a tendency to deceive the

reasonable consumer because the Apple TV 2.0 "was technologically incapable of displaying videos in true HD format according to the standards established and updated by the ATSC [Advanced Television Systems Committee] in July 2008."

More specifically, Pederson asserts that the technical standards for "true HD" were as follows: "The industry standards for 'HDTV' or 'high definition television' were developed by the [ATSC] in the early 1990s. The 'Grand Alliance' within the ATSC consisted of a consortium of electronics and telecommunications companies that assembled to develop a specification for what is now known as 'HDTV.' [¶] For videos using the H.264 codec to meet the 'HDTV' standard, the video must be displayed in either 720 or 1080 with a 16:9 aspect ratio, have a certain frame rate, and use the H.264 codec with a minimum Main or Baseline Profile at a minimum level (at 720p) of 3.2." [Fns. omitted.]

Pederson further asserts that "[a]ccording to Apple's Technical Specifications, Apple TV 2.0 supported the H.264 codec with the Main Profile and Level 3.1 and displayed videos up to 720p at 30 fps." He alleges that Apple's advertising failed to inform consumers that "the Apple TV 2.0 only supported the H.264 codec with a Main Profile and Level of 3.1--which fails to meet the ATSC standard for HDTV."

The advertising for the Apple TV 3.0 included press releases and the advertising on the Apple website where the Apple TV 3.0 could be purchased. The website advertising stated: "Apple TV gives you anytime access to endless entertainment. Thousands of HD movies and TV shows from iTunes--many in stunning l080p--play through Apple TV on your HDTV, and music and photos stream from your computer." (Emphasis omitted.) Other advertising for the Apple TV 3.0 was similar.

Pederson alleges that Apple's advertising failed to inform consumers that "the Apple TV 2.0 and Apple TV 3 .0 did not receive HD videos that equaled or exceeded a bitrate speed of at least 19 Mbps, which is the minimum bitrate speed established by the ATSC for HD videos." Additionally, "Apple failed to disclose and omitted the fact that

possessing a broadband Internet connection alone would not be sufficient to wirelessly stream television shows and movies in HD format from their Apple TV 2.0 and Apple TV 3.0 to their TV for immediate viewing."

Pederson bought an Apple TV 2.0 in January 2012. A few months later, in April 2012, Pederson bought an Apple TV 3.0. He paid $99 for each Apple TV, which he alleges he would not have bought if he had known that Apple's advertising was false. Pederson further alleges that "[d]espite the fact that [he] possessed all the equipment and services Apple represented were required for operation of his Apple TV 2.0 and his Apple TV 3.0, and despite the fact that [he] installed his Apple TV 2.0 and his Apple TV 3.0 in accordance with the instructions supplied by Apple that were included in boxes containing his Apple TV 2.0 and his Apple TV 3.0, [he] was thereafter unable to wirelessly stream videos in HD format from his Apple TV 2.0 and Apple TV 3.0 to his HD TV for immediate viewing in HD format."

In the class action allegations, Pederson defined two classes: (1) the "Apple TV Class," which consists of "[a]ll persons in California (excluding officers, directors and employees of Apple) who purchased, on or after October 31, 2008, an Apple TV 2.0 and/or an Apple TV 3.0 in the United States for their own or household use"; and (2) the "HD Class," which consists of "[a]ll persons in California (excluding officers, directors and employees of Apple) who purchased or rented from Apple, on or after October 31, 2008, videos in HD format to be viewed through their Apple TV 2.0 and/or Apple TV 3.0 in HD format."

Based on these and other allegations, Pederson asserts five causes of action: (1) violation of the UCL (fraudulent misrepresentation) (§ 17200 et seq.); (2) violation of the UCL (fraudulent omissions) § 17200; (3) violation of the CLRA Civ. Code, § 1750 [false advertising]) (CLRA); (4) breach of contract (sale of Apple TVs that were incapable of displaying "true HD"); and (5) breach of contract (selling or renting HD videos for display on Apple TVs that were incapable of displaying "true HD.")

Pederson seeks injunctive and compensatory relief, plus disgorgement of Apple's profits and attorney fees.

B. *Motion for Class Certification*

Pederson filed a motion for an order certifying the claims asserted in the two causes of action for violation of the UCL (§ 17200 et seq.) and the cause of action for false advertising in violation of the CLRA (Civ. Code, § 1750 et seq.) on behalf of two putative classes of similarly situated persons. The two putative classes defined in the motion for class certification are not exactly the same as the two putative classes defined in the complaint. The motion for class certification defined two classes, as follows.

"The 'Apple TV Class' is defined as: All persons residing in California who purchased either an Apple TV 2.0 device and/or an Apple TV 3.0 device for their own personal, family or household use during the time period from September 16, 2010 to September 30, 2015 (the 'Class Period')."

"The 'HD Class' is defined as: All persons residing in California who purchased or rented from Apple (i.e. through the iTunes Store) videos (i.e. movies and television shows) in HD format to be viewed through the use of their Apple TV 2.0 and/or Apple TV 3.0 device in HD format during the Class Period."

Both the Apple TV class and the HD class exclude the officers, directors and employees of Apple. Pederson also moved for an order appointing him as the class representative of both classes and his attorneys as class counsel.

Pederson argued that class certification was appropriate because the requirements set forth in Code of Civil Procedure section 382 were satisfied. First, the requirement of ascertainability was satisfied because the members of the Apple TV class and the HD class members could be identified from Apple's records.

Second, common questions of fact and law predominated, according to Pederson, because the evidence supporting the motion showed that Apple's advertising for the Apple TV 2.0 and Apple TV 3.0 was false, misleading, had a tendency to deceive, or

contained material omissions of fact. Although Pederson acknowledged that the ATSC standards for HD television did not apply to Apple TV devices, he asserted that consumers would expect the Apple TV's HD quality to meet the ATSC's standards due to Apple's use of the ATSC's terms "HD," "HDTV," and "1080p High Definition" in its advertising.

Regarding his own experience, Pederson stated that although his Internet speed and equipment met Apple's technical requirements, he experienced long video start times and buffering when he attempted to view HD movies or television shows rented or purchased from Apple on his Apple TV devices, and therefore playback was not instant or uninterrupted as advertised by Apple. Pederson emphasized that the consumer survey conducted on his behalf showed that other Apple TV consumers also experienced long video start times and buffering.

Third, Pederson argued that common questions predominated with respect to his theory of recovery, a complete refund. Pederson explained that his "theory of recovery is that the Apple TV 2.0 and 3.0 packaging and Apple's web page advertisements for Apple TV 2.0 and 3.0 contained material statements that were literally false, misleading, had a tendency to deceive, and/or contained material omissions of fact and that the Apple TV Class and the HD Class member are entitled to restitution and damages in the form of a complete refund under the UCL and the CLRA."

Finally, Pederson maintained that his claims against Apple are typical of the Apple TV class and the HD class, and that he and his counsel will fairly and adequately represent the interests of both classes. Pederson also asserted that class certification would provide redress for thousands of small claimants who would not be able to maintain individual actions against Apple.

C. *Opposition to Motion for Class Certification*

In opposition to the motion for class certification, Apple argued that Pederson had not met his burden to show that common questions predominated as to liability and

damages. Regarding liability, Apple pointed out that the consumer survey obtained by Pederson showed that Apple consumers had no common understanding of the allegedly deceptive terms in Apple's advertising, including "HD," "High Definition," speed of delivery as "instant" or "without interruption," and "only a broadband Internet connection" is required. Apple also argued that Pederson had provided no evidence of class-wide exposure to Apple's advertising for the Apple TV 2.0 and 3.0, which varied over time.

Additionally, Apple contended that individual issues predominated with respect to consumer reliance on Apple's representation, since Apple's representations regarding the Apple TV devices in press releases, packaging, and websites were not uniform, and the consumer survey indicated that consumers had different reasons for purchasing the Apple TV devices. Further, Apple argued that the putative classes were overbroad and not ascertainable, since the class definitions would include, for example, consumers who did not rely on Apple's advertising in purchasing an Apple TV, were satisfied with their purchase, or never purchased or rented HD videos from Apple.

Regarding Pederson's refund theory of recovery, Apple argued that Pederson had not shown that a complete refund could be applied as a measure of damages on a class-wide basis, since there was no evidence that the alleged deceptive advertising rendered the Apple TV 2.0 or 3.0 worthless, and the Apple TVs had features that consumers used in addition to HD streaming. Apple noted that Pederson's expert, accountant Heather Xitco, had not provided a measure of damages that would apply in this case.

Apple emphasized that more than 85 percent of the consumer survey respondents had reported that they were either very satisfied or somewhat satisfied with their Apple TVs. Apple also emphasized that both the consumer survey and Apple's records of customer complaints indicated that "very few" and "minimal percentages" of members of the putative classes were dissatisfied due to HD quality or buffering. Specifically, Apple stated that "of the 9.3% of Apple TV 2.0 respondents who were dissatisfied, only

5 respondents (8.2%) claimed to have experienced buffering delays and of the 9% of Apple TV 3.0 respondents who were dissatisfied, only 5 (10.9%) claimed to have experienced buffering delays." (Emphasis omitted.)

Apple also argued that individual issues would predominate with respect to damages. According to Apple's technical expert, Nathaniel Polish, Ph.D., the Apple TV 2.0 and 3.0 were "fully capable of operating as advertised at the average Internet speeds prevalent in the U.S. when the devices were released." It was also Polish's opinion that factors outside of Apple's control could affect Internet speed and the Apple TV's performance, including the Apple TV's distance from the Internet source, interference from interior and exterior walls, or the simultaneous use of multiple devices reducing bandwidth. Apple also stated that the HD viewing experience could be affected by other factors, including "the type of television used, the television's default settings, the distance at which a user sits, and even the user's eyesight."

As to ascertainability, Apple stated that the members of the Apple TV class and the HD class were not ascertainable because the proposed classes were overbroad. Apple explained that the proposed classes included persons who did not have a viable claim against Apple (for example, persons who were satisfied with their Apple TV), or who had not been exposed to the allegedly deceptive advertising for Apple TV.

Finally, Apple argued that Pederson was not an adequate or typical representative of the proposed classes, since his experience with his Apple TVs was different than the majority of Apple TV purchasers, who were satisfied with their devices. Additionally, Apple asserted that Pederson did not have standing to represent purchasers who, unlike Pederson, had read the technical specifications for Apple TVs or purchased their Apple TVs before Apple's February 2011 disclosure of the recommended Internet speeds. Apple also stated that it intended to seek sanctions for Pederson's spoliation of evidence, based on Pederson's disposal of his Apple TV 2.0 and Apple TV 3.0 after he filed this lawsuit, which rendered him atypical of the putative classes.

D. *The Trial Court's Order Denying the Motion for Class Certification*

The trial court denied Pederson's motion for class certification in the June 19, 2018 order. Although the court found that the proposed Apple TV class and HD class were both numerous and ascertainable, the court determined that common issues did not predominate as to liability and damages.

Regarding liability, the trial court stated: "[E]ven assuming that users with slower Internet speeds did experience problems, the record does not support a finding that the large portion of class members who had the recommended Internet speeds would have experienced the issues asserted by plaintiff. Thus, there is a lack of commonality regarding whether putative class members may have experienced quality or playback issues resulting from their Internet service. There is inadequate evidence that those with the requisite Internet speeds were harmed by Apple's advertising practices [citation] or even potentially misled by the advertising at issue. While the Court is mindful that *individualized* proof of deception, reliance and injury is not required in false advertising class actions, here plaintiff lacks evidence of even a *general* problem experienced by putative class members."

The trial court also found that Pederson "[d]oes not explain or provide any evidence showing the practical impact of [the] technical differences between Apple TV's capabilities and the ATSC standard. There is no indication that Apple TV users would have been able to perceive a difference between the Apple TV videos and videos that meet the ATSC standard. [Pederson] does not attempt to explain how this issue can be addressed in the context of a large group of purchasers using different equipment to view the videos at issue. While the Court credits [Pederson's] survey showing that many purchasers believed that there was an industry standard for 'HD,' this does not establish that a merely technical variation from that standard was material to them. In short, there is no showing that any class members relied on, were likely to be misled by, or were harmed by these asserted omissions." (Fn. omitted.)

With respect to damages, the trial court found that "[Pederson's] theory is that putative class members are all entitled to a complete refund of their Apple TV and HD video purchases. However, even assuming they experienced the issues alleged by [Pederson], there is no evidence that class members' purchases were therefore rendered worthless. 'While a full refund may be proper when a product confers *no* benefit on consumers,' where this is not the case, the plaintiff must establish an appropriate 'price/value differential' to support an award of restitution. [Citation.] Plaintiff does not attempt to show how he would do so in this case, and he accordingly does not demonstrate that this issue can be resolved on a classwide basis. Certification is not appropriate for this reason. [Citation.]" (Fn. omitted.)

Finally, the trial court declined to appoint Pederson as class representative, finding that his claims were not typical of the class. "Based on the record before the Court, [Pederson's] experience with his devices does not appear representative of the putative classes, and, at least with respect to his Apple TV 2.0, he is unable even to show that his device itself was typical."

E. *Motion for Reconsideration*

Pederson moved for reconsideration of the June 19, 2018 order denying his motion for class certification. He argued that the order should be modified or reversed under Code of Civil Procedure section 1008 on the ground of new evidence that could not have been presented earlier. Alternatively, Pederson argued that a trial court is authorized to modify an order denying class certification at any time.

Pederson claimed that Apple had filed a subsequent "Motion to Strike" that created a "false impression," and that he should be allowed to present evidence to counter the "false impression." According to Pederson, the "false impression" was given by Apple's statement in its "Motion to Strike" that " '[Pederson] got rid of his Apple TV 2.0 despite the fact that his lawsuit is premised on the alleged deficient performance of that

very product.' " Pederson explained that his claims were based on Apple's false advertising, not on the deficient performance of the Apple TV 2.0 or 3.0.

The evidence that Pederson identified as new evidence consisted of Apple's document production regarding its testing of the Apple TV devices, as well as the deposition testimony of Apple's persons most knowledgeable regarding customer complaints and the encoding of movies for streaming on iTunes. Pederson asserted that this evidence showed that Apple had never claimed that the deficient performance of his Apple TVs were caused by a product defect or physical damage, and there was a high volume of customer complaints regarding slow start times for video playback.

Additionally, Pederson contended that the new evidence showed that his claims were typical of the class, and the legal authorities the trial court relied on did not support a finding that Pederson was not typical. Alternatively, Pederson contended that the trial court should amend its order to allow new individual plaintiffs or to redefine the class.

Finally, Pederson argued that the trial court erred in finding that common issues did not predominate with regard to liability, pointing to evidence in the record that he believed would support his claim that purchasers of Apple TV 2.0 and 3.0 experienced issues with HD quality and playback times that they would have not expected due to Apple's false and misleading advertising.

F. *Opposition to Motion for Reconsideration*

In opposition to the motion for reconsideration, Apple argued that the motion should be denied because Pederson had failed to present the trial court with " 'new or different facts, circumstances, or law' " as required for reconsideration under Code of Civil Procedure section 1008. Apple pointed out that the evidence that Pederson had claimed was new evidence was not new because it was available before Pederson filed his reply to Apple's opposition to his motion for class certification. Apple also pointed out that Pederson had not presented any new legal authorities.

Additionally, Apple argued that the motion for reconsideration should be denied because Pederson simply disagreed with the trial court's rulings, and disagreement is not a ground for reconsideration. Apple also noted that Pederson had not addressed two of the trial court's findings, including the finding that Pederson had failed to show that restitution or damages could be determined on a classwide basis, and the finding that there was no evidence that putative class members had been misled or harmed by Apple's omissions regarding compliance with the ATSC standards for HD.

Finally, Apple contended that Pederson should not be allowed to amend his complaint, redefine the class, or add new plaintiffs, since the case had been litigated for nearly six years and a trial date was pending.

G. *The Trial Court's Order Denying the Motion for Reconsideration*

The trial court denied Pederson's motion for reconsideration in the July 25, 2018 order. The order includes a summary of the trial court's reasoning in denying the motion for class certification, as follows: "On June 19, [2018,] the Court denied [Pederson's] motion for class certification, finding that [Pederson] failed to show commonality with respect to HD quality or playback issues experienced by the class and with regard to the materiality of the technical variations from the ATSC standard described by [Pederson]. The Court also found that [Pederson] failed to show restitution could be awarded on a classwide basis because the evidence did not support his proposed full refund theory and he had not proposed any other theory of restitution. Finally, the Court found that plaintiff did not show his claims were typical of the class."

The order further states that the motion for reconsideration was denied because "[t]here are no new or different facts, circumstances, or law supporting the motion (see Code Civ. Proc.,§ 1008), nor do [Pederson]'s arguments therein demonstrate that the Court's order was erroneous."

III. DISCUSSION

On appeal, Pederson contends that the trial court erred in denying his motion for class certification because the trial court improperly determined the merits of the class claims in finding that common questions did not predominate as to Apple's liability for its allegedly false and misleading advertising for the Apple TV 2.0 and Apple TV 3.0. Pederson also contends that the trial court erred in rejecting his proposed measure of class-wide damages, a full refund, since those damages may be calculated by his expert accountant. Peterson also contends that the evidence showed that his claims are typical of the putative classes.

We will begin our review of Pederson's contentions with an overview of the requirements for certification of a class action.

A. *Overview of Class Action Requirements*

Similar to the plaintiff in *Noel v. Thrifty Payless, Inc*. (2019) 7 Cal.5th 955 (*Noel*), Pederson has "sought certification of a class pursuant to section 382 of the Code of Civil Procedure, which provides a general authorization for class actions, and section 1781 of the Civil Code, the provisions of which govern class suits brought under the CLRA and inform class action practice more generally. [Citations.]" (*Id*. at p. 968.)

"Section 382 of the Code of Civil Procedure authorizes a class action when 'the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.' '[W]e have articulated clear requirements for the certification of a class' under this statute. [Citation.] 'The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives.' [Citation.] 'The community of interest requirement involves three factors: "(1) predominant common questions of law or fact; (2) class representatives with claims

or defenses typical of the class; and (3) class representatives who can adequately represent the class." ' [Citation.]" (*Noel, supra,* 7 Cal.5th 955 at p. 968.)

"The CLRA includes its own set of requirements for class certification. Under this statute, 'The court shall permit [a class] suit to be maintained on behalf of all members of the represented class if all of the following conditions exist: (1) It is impracticable to bring all members of the class before the court. [¶] (2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members. [¶] (3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class. [¶] (4) The representative plaintiffs will fairly and adequately protect the interests of the class.' (Civ. Code, § 1781, subd. (b).)" (*Noel, supra,* 7 Cal.5th at p. 969.)

Thus, "both Code of Civil Procedure section 382 and the CLRA require a showing that common questions of law or fact predominate in order for class certification to be proper." (*Quacchia v. DaimlerChrysler Corp.* (2004) 122 Cal.App.4th 1442, 1449.)

B. *Standard of Review*

"The denial of certification to an entire class is an appealable order [citations]." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (*Linder*).) "We review the trial court's ruling for abuse of discretion. 'Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. . . . [Accordingly,] a trial court ruling supported by substantial evidence generally will not be disturbed "unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]" [citation].' " (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326-327 (*Sav-On*.) "We must '[p]resum[e] in favor of the certification order . . . the existence of every fact the trial court could reasonably deduce from the record. . . .' [Citation.]" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022 (*Brinker*).)

In applying this standard of review, "we must examine the trial court's reasons for denying class certification. 'Any valid pertinent reason stated will be sufficient to uphold the order.' [Citation.]" (*Linder, supra,* 23 Cal.4th at p. 436.)

C. *Order Denying Motion for Class Certification*

We will begin our analysis by addressing one of the trial court's reasons for denying class certification: Pederson failed to show that his desired remedy—a complete refund—could be awarded on a class-wide basis, and he did not propose any other theory of class-wide recovery.

On appeal, Pederson argues that the trial court erred because he "presented evidence that the Apple products at issue [were] valueless and therefore amenable to full refund treatment. Specifically, if Apple TV 2.0 and 3.0 were incapable of transmitting 'HD' videos, and 'HD' video purchased on iTunes were not in fact 'HD' quality, the Apple products at issue were valueless." Pederson also argues that the trial court improperly applied the ruling in *Comcast Corp. v. Behrand* (2013) 569 U.S. 27, 35 that the party moving for class certification must "establish that damages are susceptible of measurement across the entire class for purposes of [Fed. Rules Civ. Proc.,] Rule 23(b)(3)."

Pederson also contends that his "expert testimony demonstrated that the computation of the Apple TV Class and the HD Class members' restitution claims under the UCL or actual damages under the CLRA can be easily calculated based upon Apple's own discovery responses and records."

Additionally, Pederson argues that the trial court improperly considered the merits of the class claims in finding that there was no showing of harm to the putative class members because there was no evidence that a difference in HD quality could be perceived between the Apple TV videos and videos that met ATSC standards, and no evidence that the Apple TVs were otherwise worthless.

Apple responds that the trial court did not cite or rely upon the decision in *Comcast*, although the decision is consistent with California law. Further, Apple asserts that Pederson failed to show that the trial court's rulings regarding Pederson's full refund theory of recovery were not supported by substantial evidence. Apple also maintains that the trial court did not improperly consider the merits in rejecting Pederson's full refund theory, since "the trial court correctly recognized that whether all potential class members could seek full refunds was a question antecedent to certification: if Pederson's restitution theory was not viable, individual issues would predominate."

We are not persuaded by Pederson's arguments, for several reasons. First, to the extent Pederson contends that the trial court relied upon improper criteria with respect to his complete refund theory of recovery, we disagree. "[I]n determining whether there is substantial evidence to support a trial court's certification order, we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. [Citation.]" (*Sav-On, supra*, 34 Cal.4th at p. 327.)

The California Supreme Court has also instructed that " ' "[a]s a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." [Citations.]' [Citations.] However, we have cautioned that class treatment is not appropriate 'if every member of the alleged class would be required to litigate numerous and substantial questions determining his [or her] individual right to recover following the "class judgment" ' on common issues. [Citation.]" (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 28.)

Moreover, it is well established that neither recovery of damages under the CLRA nor restitution under the UCL is available without proof of damage or loss. As to the UCL, "in order to obtain classwide restitution under the UCL, plaintiffs need establish not only a misrepresentation that was likely to deceive [citation] but also the existence of

a 'measurable amount' of restitution, supported by the evidence. [Citation.]" (*In re Vioxx Class Cases* (2009) 180 Cal.App. 4th 116, 136 (*Vioxx*); see also *In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 795 (*Tobacco Cases II*) [section 17203 of the UCL does not allow the imposition of a monetary sanction absent a measurable loss]; *Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 229 [same]; *Colgan v. Leatherman Tool Group, Inc*. (2006) 135 Cal.App.4th 663, 698 [same].)

Similarly, with respect to the CLRA, the California Supreme Court has stated: "[Section1780, subdivision (a)] provides that in order to bring a CLRA action, not only must a consumer be exposed to an unlawful practice, but some kind of damage must result." (*Meyer v. Sprint Spectrum L.P*. (2009) 45 Cal.4th 634, 641; see also *Hansen v. Newegg.com Americas, Inc*. (2018) 25 Cal.App.5th 714, 724 [under CLRA, "consumer must merely 'experience some [kind of] damage' or 'some type of increased costs' as a result of the unlawful practice"]; *Bower v. AT&T Mobility, LLC* (2011) 196 Cal.App.4th 1545, 1556 [plaintiffs in a CLRA action must show that the defendant's deception caused them harm].) Thus, even assuming that the trial court relied on the decision in *Comcast*, such reliance would not be error because the California appellate courts have determined that a measurable amount of restitution or damages is required for recovery under the UCL and the CLRA.

With regard to a full refund theory of recovery, the decision in *Tobacco Cases II* is instructive. In *Tobacco Cases II*, a class of California cigarette smokers brought a UCL class action alleging that defendant Philip Morris's advertising of Marlboro Lights cigarettes was deceptive. (*Tobacco Cases II*, *supra*, 240 Cal.App.4th at p. 786.) The appellate court upheld the trial court's ruling, after a court trial on the class claims, "that since plaintiffs received value from Marlboro Lights apart from the deceptive advertising, the proper measure of restitution was the difference between the price paid and the actual value received. [Citation.]" (*Id*. at p. 787.) The appellate court also reasoned that "[w]hile a full refund may be proper when a product confers *no* benefit on consumers,

such is not the scenario here. Plaintiffs do not dispute the court's finding that they obtained value from Marlboro Lights apart from the deceptive advertising. Indeed, it appears inherently implausible to show a class of smokers received *no* value from a particular type of cigarette. Under the circumstances, the *Vioxx*, *supra*, 180 Cal.App.4th at page 131, measure of restitution was proper, and as plaintiffs did not establish any price/value differential the court lacked discretion to award restitution." (*Id*. at p. 802, fn. omitted.)

In *Vioxx*, the plaintiffs sought class certification of their claims against defendant Merck & Co. Inc., for deceptive advertising of the safety of Vioxx, a non-steroidal anti-inflammatory drug. (*Vioxx*, *supra*, 180 Cal.App.4th at p. 120.) The *Vioxx* court affirmed the trial court's order denying class certification on the ground that substantial evidence supported the trial court's finding that individual issues predominated. (*Id.* at pp. 120-121.) In particular, the appellate court determined that the trial court had properly concluded that restitution could not be calculated on a class-wide basis because "the monetary value plaintiffs wish to assign to their claim—the difference in price between Vioxx and a generic, non-specific NSAID, implicates a patient-specific inquiry and therefore fails the community of interest test." (*Id.* at p. 135, fn. omitted.)

In the present case, the trial court determined that Pederson's full refund theory of recovery could not be applied on a class-wide basis because, even assuming the putative class members had experienced the issues with HD display or video playback asserted by Pederson, there was no evidence that these issues rendered the Apple TV 2.0 and 3.0 worthless. Citing the decision in *Vioxx*, *supra*, 180 Cal.App.4th 116, the trial court concluded that " '[w]hile a full refund may be proper when a product confers no benefit on consumers,' where this is not the case, the plaintiff must establish an appropriate 'price/value differential' to support an award of restitution. [Citation.] [Pederson] does not attempt to show how he would do so in this case, and he accordingly does not demonstrate that this issue can be resolved on a classwide basis."

We determine that substantial evidence supports the trial court's finding that the Apple TV 2.0 and 3.0 had some value to the putative class members, and therefore a full refund theory of recovery could not be applied on a class-wide basis. This evidence includes the consumer survey results showing that 85 percent of the survey respondents were very or somewhat satisfied with the Apple TVs, the availability of non-video features (such as streaming music and photos), and Pederson's deposition testimony that he had streamed numerous HD videos that he obtained from iTunes on his Apple TVs. We also presume that the trial court could reasonably deduce from this evidence that individual questions of fact would prevail as to the value that individual putative class members placed on their Apple TVs, (see *Brinker, supra*, 53 Cal.4th at pp. 1021-1022) and therefore the full refund theory of recovery fails the community of interest test. (See *Vioxx, supra,* 180 Cal.App.4th at p. 135.)

Additionally, Pederson does not dispute the trial court's finding that he did not present an alternative measure of damages that could be applied on a class-wide basis. Although Pederson contends that his accountant expert, Heather Xitco, could calculate the amount of restitution and damages on a class-wide basis from Apple's records, his contention is based on his full refund theory of recovery.

Finally, we are not persuaded by Pederson's argument that the trial court improperly considered the merits of the class claims in determining that Pederson's full refund theory of recovery could not be applied on a class-wide basis. The California Supreme Court has instructed that "[w]hen evidence or legal issues germane to the certification question bear as well on aspects of the merits, a court may properly evaluate them. [Citations.] The rule is that a court may 'consider[ ] how various claims and defenses relate and may affect the course of the litigation' even though such 'considerations . . . may overlap the case's merits.' [Citations.]" (*Brinker, supra,* 53 Cal. 4th at pp. 1023-1024.) Accordingly, the trial court did not err in considering whether a full refund theory of recovery could be applied on a class-wide basis in this case, in light

of the evidence showing that most of the putative class members did not find their Apple TV 2.0 or 3.0 to be worthless.

Having determined that the trial court did not err in finding that Pederson failed to show that common questions predominated as to restitution and damages, we conclude that the trial court did not abuse its discretion in denying Pederson's motion for class certification. As we have noted, we examine the trial court's reasons for denying class certification, and " '[a]ny valid pertinent reason stated will be sufficient to uphold the order.' [Citation.]" (*Linder, supra,* 23 Cal.4th at p. 436.) We therefore need not address the other issues that Pederson raises in his challenge to the trial court's order denying his motion for class certification.

D. *Order Denying Motion for Reconsideration*

Pederson's argument on appeal regarding the trial court's order denying his motion for reconsideration of the order denying his motion for class certification states, in its entirety, "[t]he Trial Court erred in denying the motion for reconsideration by holding that it did not demonstrate that the Court's order denying the motion for class certification made erroneous legal assumptions applying the criteria for community of interest requirement and the Court's findings that Pederson's claims did not present predominant common questions of law or fact and that Pederson's individual claims were not typical of the class were not supported by substantial evidence."

Apple argues that Pederson has forfeited the issue by failing to address the trial court's ruling that the motion did not satisfy the requirements for reconsideration under Code of Civil Procedure section1008 because he did not provide any new evidence or new legal authority in support of the motion.

An order denying a motion for reconsideration is not separately appealable, but may be review on appeal from the order that is the subject of the motion. (Code Civ. Proc., § 1008, subd. (g).) This court recently stated, "[a] motion for reconsideration under section 1008, subdivision (a) is not focused on error-correction. [I]t asks the trial

court to reconsider its earlier ruling either based on additional evidence or new law." (*Global Protein Products, Inc. v. Le* (2019) 42 Cal.App.5th 352, 364.) The standard of review is abuse of discretion. (*Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 871.)

We find no merit in Pederson's conclusory assertions regarding the order denying his motion for reconsideration, since "[c]onclusory assertions of error are ineffective in raising issues on appeal. [Citation.]" (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 523.) Accordingly, we conclude the trial court did not abuse its discretion in denying the motion for reconsideration.

IV. DISPOSITION

The June 19, 2018 order denying the motion for class certification is affirmed. Costs on appeal are awarded to respondent.

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ELIA, J.

WE CONCUR:

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PREMO, Acting P. J.

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GROVER, J.

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